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IN THE

Supreme Court of the United States

October Term, 1963

No. 300

REV. L. A. CLARK, ET AL.,
Petitioners,

v.

ALLEN C. THOMPSON, Mayor, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Reasons for Allowance of Writ	6
Conclusion	15
APPENDICES:	
A—Denial of Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit	17
B—Judgment of the United States Court of Appeals for the Fifth Circuit	17
Opinion of the United States Court of Appeals for the Fifth Circuit	18
C—Opinion of the United States District Court for the Southern District of Mississippi, Jackson Division	19
D—Section 2046.5(1), Sections 2056(7), and 4065.3 of the Mississippi Code of 1942; Ann.	27

Table of Cases Cited

Browder v. Gayle, 352 U. S. 903, affirming 142 F. Supp. 707 (M. D. Ala., 1956)	10
Brown v. Board of Education, 347 U. S. 483	8, 10, 15
Brown v. Board of Trustees of La Grange, Ind. School District, 187 F. 2d 20 (C. A. 5, 1951)	9
Bush v. Orleans Parish School Board, 194 F. Supp. 182 (D. C. La., 1961)	15

	PAGE
Clark, et al. v. Thompson, et al., 206 F. Supp. 539 (S. D. Miss., 1962)	9
Coke v. City of Atlanta, Georgia, 184 F. Supp. 579 (N. D. Ga. 1960)	8
Constantine, et al. v. Southwestern Louisiana Institute, 120 F. Supp. 417 (W. D. Louisiana, 1954)	8, 9
Dawson v. Mayor and City Council of Baltimore, 220 F. 2d 386 (C. A. 4, 1955), aff'd 350 U. S. 877	10, 15
Eastman Kodak Co. v. Velvray Corp., 175 F. Supp. 646 (S. D. N. Y., 1959)	12
Evers v. Dwyer, 358 U. S. 202	9
Frazier v. Board of Trustees of University of N. C., 134 F. Supp. 589 (M. D. N. Car., 1955)	9
Gilmore v. City of Montgomery, 176 F. Supp. 776 (M. D. Ala. 1959)	6, 15
Harrison v. NAACP, 360 U. S. 167	13
Hawkins v. Board of Control, 162 F. Supp. 851 (N. D. Florida, 1958)	9
Holmes v. City of Atlanta, 124 F. Supp. 290 (N. D. Ga. 1954), 350 U. S. 879	7, 10
Johnson v. Board of Trustees of University of Kentucky, et al., 83 F. Supp. 707 (E. D. Kentucky, 1949)	8
Johnson v. Yeilding, 165 F. Supp. 76 (N. D. Ala. 1958)	8
Kansas City, Mo. v. Williams, 205 F. 2d 47 (C. A. 8, 1953)	6
McLaurin v. Oklahoma State Regents, 339 U. S. 637	10
Muir v. Louisville Park Theatrical Ass'n, 347 U. S. 971	10
NAACP v. Button, 371 U. S. 415	13
NAACP v. Patty, 159 F. Supp. 503 (E. D. Va., 1958)	13

PAGE

Orleans Parish School Board v. Bush, 242 F. 2d 156 (C. A. 5, 1957) 8
Oyama v. California, 332 U. S. 633 10

Paramount Pictures Corp. v. Holden, 166 F. Supp. 684 (S. D. Calif., 1958) 12
Poe v. Ullman, 367 U. S. 497 13
Potts v. Flax, 313 F. 2d 284 (C. A. 5, 1963) 7, 8, 9

Sharp v. Lucky, 252 F. 2d 910 (C. A. 5, 1958) 8
Simmonds Aerocessories v. Elastic Stop Nut Corp., 257 F. 2d 485 (C. A. 3, 1958) 12
Stapleton v. Mitchell, 60 F. Supp. 51 (D. Kan., 1945) 15
State Athletic Commission v. Dorsey, 359 U. S. 533, affirming 168 F. Supp. 149 (E. D. Louisiana, 1958) 10
Sweatt v. Painter, 339 U. S. 629 10

Takahashi v. Fish & Game Commission, 334 U. S. 410 10
Tomkins v. City of Greensboro, N. C., 276 F. 2d 890 (C. A. 4, 1960) 15
Tureaud v. Board of Supervisors of Louisiana State University, 116 F. Supp. 248 (E. D. Louisiana, 1953), aff'd 228 F. 2d 695 (C. A. 5, 1956) 9

Vann, et al. v. Toledo Metropolitan Housing Authority, 113 F. Supp. 210 (N. D. Ohio, 1953) 8

Watson, et al. v. City of Memphis, et al., — U. S. —, 31 L. W. 4498 (May 27, 1963) 9, 10
Wilson v. Board of Supervisors, 92 F. Supp. 986 (E. D. Louisiana, 1950), aff'd 340 U. S. 909 8

Yick Wo v. Hopkins, 118 U. S. 356 10

Other Authorities Cited

	PAGE
Constitution of the United States, Fourteenth Amendment	2
Declaratory Judgments, by Borchard (Banks-Baldwin Law Publishing Co., Cleveland, 1941)	12
Federal Rules of Civil Procedure, Rule 23	7
Mississippi Code of 1942, Sections 4065.3, 2056(7) and 2046.5(1)	2, 10, 11
Title 28, United States Code, Section 1254(1)	2
Title 28, United States Code, Section 2281	13
Title 42, United States Code, Sections 1981-1983	2, 10

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v.

ALLEN C. THOMPSON, Mayor, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 23, 1963, in the above-entitled cause.

Opinion Below

The order of the United States Court of Appeals for the Fifth Circuit denying a rehearing of its judgment of March 6, 1963 is not reported and is printed as Appendix A, *infra*, at 1a. The per curiam opinion of the United States Court of Appeals for the Fifth Circuit entered on March 6, 1963 is not reported and is printed in Appendix B, *infra* at page 18. The opinion of the United States District Court for the Southern District of Mississippi, Jackson Division, entered on May 16, 1962, is printed in Appendix C, *infra* at page 19.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 23, 1963 (R. 364). Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Whether Negro petitioners seeking the use of public facilities on a non-segregated basis pursuant to the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States have the right to maintain a class action for other Negroes similarly situated, and whether petitioners are entitled to injunctive relief against state segregation statutes and against the state policy of enforced racial discrimination in public facilities?

Statement

Petitioners filed a complaint in the United States District Court for the Southern District of Mississippi, Jackson Division, on January 12, 1962 (R. 2-13) seeking a declaratory judgment that Sections 4065.3, 2056(7) and 2046.5(1) of the Mississippi Code of 1942, Ann., violate the Fourteenth Amendment of the Constitution of the United States. These statutes are set out in Appendix D. The complaint also sought an injunction against the enforcement of these statutes and of the policy and practice of the respondent state officials which prevent petitioners and others similarly situated from using public recreational facilities on an integrated and equal basis, solely on the grounds of race and color, and which therefore violate the Fourteenth Amendment to the Constitution of the United States and the rights secured by Sections 1981 and 1983 of Title 42, United States Code. Respondents are public officials of

the City of Jackson charged with the enforcement of these statutes. Petitioners prayed that a three-judge court be convened under 28 United States Code, Sections 2281 and 2284, and that the cause be advanced on the docket for a speedy hearing.

On February 2, 1962, respondents moved to dismiss the complaint, and on February 5 moved to dissolve the three-judge court. On February 20, 1962, the court denied respondents' pending motions.

Petitioners amended their complaint as of course on February 16, 1962, dropping one party defendant and substituting another (R. 13-16).

On March 1, 1962, respondents answered the complaint. (R. 16-19) alleging that the constitutionality of the statutes was not the real issue; that the State courts should be allowed to construe the statutes; that some of the respondents were misjoined; and that the amended complaint did not state a cause of action.

On April 19, 1962, the three-judge court was dissolved on the grounds that if the statutes were held to segregate petitioners on the basis of race, they would be so patently unconstitutional that they would not require a three-judge court; or if the statutes were not the crux of the case, a three-judge court would not be proper (R. 20-22).

Trial was held on March 12, 1962. The evidence showed that petitioners are Negroes, citizens of the United States and residents of Jackson. Uncontroverted testimony revealed that Negroes had been refused the right to use the Municipal Library– a library open for white persons only; that a group of Negro college students who attempted to use the facilities in March, 1961, were told to use the Negro library and on their failure to do so were arrested, and charged with breach of the peace (R. 29, 30, 63).

Respondents attempted to show that these students were not entitled to use the Municipal Library because they were not residents of Jackson, Mississippi. The evidence revealed, however, that one of the arrested Negro students was a resident of Jackson; that all had been told to use the Negro library (purportedly subject to the same residential requirements as the Municipal Library); that the rules in respect to residence in Jackson apply only to card-securing privileges, and that it is not the custom of the librarians to inquire of persons who merely want to read or use books of reference in the library, whether they are residents of Jackson (R. 46, 63, 71-72, 86-87). There can be no question but that these persons were not allowed to use the Municipal Library solely because of their race and color.

The evidence further showed that Negroes who had attempted to sit on benches in Livingston Park were arrested (R. 98, 100); those who sought to use the swimming pool and those who sat on benches outside the swimming pool enclosure were arrested (R. 112-114); that the Director of Public Parks had prepared a memorandum showing that public parks, golf courses and auditorium are established exclusively for Negroes and designated as Negro facilities (R. 143-153).

The Chief of Police testified that the arrests made where Negroes attempted to assert their right to free use of public facilities took place because of fear of public disturbance (R. 201). In no instance was anyone arrested for doing anything other than attempting peacefully to use public facilities, a right which is guaranteed by the Constitution of the United States.

On May 16, 1962, the United States District Court handed down its opinion (R. 330-339) holding:

> (1) That this is not a proper class action and no relief may be granted other than that to which the plaintiffs are personally entitled.

(2) That each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson.

(3) That the plaintiffs are not now entitled to any injunctive relief, but jurisdiction over this action and each of the defendants is hereby retained for the entry of such further orders and relief as may be subsequently appropriate.

(4) That all Court costs incurred herein be and the same are hereby taxed against the defendants.

On June 8, 1962, petitioners filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit (R. 340) appealing from so much of the judgment entered in this action on May 16, 1962, as follows the words "ORDERED, ADJUDGED AND DECLARED as follows, to-wit:"

(1) That this is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled.

(3) That the plaintiffs are not now entitled to any injunctive relief, but jurisdiction over this action and each of the defendants is hereby retained for the entry of such further orders and relief as may be subsequently appropriate.

As the printing of the record was not completed, petitioners were given a 90-day extension of time to file the record on July 17, 1962 (R. 349).

On March 6, 1963, the court below rendered its decision in this cause, affirming the order of the United States District Court for the Southern District of Mississippi, Jackson Division (R. 355). On March 25, 1963, petitioners filed a Petition for Rehearing in the court below, contending that its decision was in conflict with the rulings of the federal courts and particularly of the United States Court

of Appeals for the Fifth Circuit. On April 23, 1963, the court entered an order without opinion denying the Petition for Rehearing (R. 364).

Whereupon, petitioners bring the cause here, seeking a review by this Court of the judgment and decree of the United States Court of Appeals for the Fifth Circuit.

Reasons for Allowance of Writ

1. The ruling of the United States Court of Appeals for the Fifth Circuit that Negroes discriminated against as a class by the state may not maintain a suit on behalf of other Negroes in the state who are similarly situated, is in direct conflict with the prior decisions of the federal courts.

The question of whether Negroes prevented because of their race from using public recreational facilities can bring a class action was settled in *Kansas City, Mo.* v. *Williams*, 205 F. 2d 47 (C. A. 8, 1953), which reversed a lower court holding. The Court of Appeals said at page 52:

> Violations of the Fourteenth Amendment are of course violations of individual or personal rights, but where they are committed *on a class basis or as a group policy*, such as a discrimination generally because of race, they are no less entitled to be made the subject of class actions and class adjudication under Rule 23, Federal Rules of Civil Procedure, 28 U. S. C. A., than are other several rights. (Emphasis added.)

In *Gilmore* v. *City of Montgomery*, 176 F. Supp. 776 (M. D. Ala. 1959), another case on exactly this point, Negroes were denied the use of the public parks on a non-segregated basis. This was an action by citizens on behalf of themselves and others similarly situated seeking an injunction against a city ordinance and the policy and practice of denying the use of public parks to plaintiffs and the class

they represented. While the record contained only one instance of arrest for trespassing in the park, the court held that the testimony showed that there was a policy, practice and custom of enforced segregation. Plaintiffs as a class were granted the injunction.

In another recreational facilities case, *Holmes* v. *City of Atlanta*, 124 F. Supp. 290 (N. D. Ga., 1954), plaintiff was held properly to have brought a class suit to determine the right of all Negro citizens to use a public golf course. *Holmes* v. *City of Atlanta*, 350 U. S. 879, established plaintiff's right not merely to an equal golf course but to integrated facilities.

A recent case in the same Circuit as the decision below clearly spelled out the rationale underlying class actions attacking governmentally-imposed segregation. *Potts* v. *Flax*, 313 F. 2d 284 (C. A. 5, 1963). The suit was brought to desegregate public educational facilities. The complaint alleged with precision that it was brought as a class suit under Rule 23 of the Federal Rules of Civil Procedure. The defendant School Board argued that a class action was not appropriate because each student is registered, admitted, assigned, and transferred as an individual. In approving the District Court's ruling that the suit was an appropriate class action, the court held at pages 288-289:

> Properly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school. The peculiar rights of specific individuals were not in controversy. It was directed at the system-wide policy of racial segregation. It sought obliteration of that policy of system-wide racial discrimination. In various ways this was sought through suitable declaratory orders and injunctions against any rule, regulation, custom or practice having any such consequences. The case therefore had those elements which are sometimes suggested as a distinction between those which are, or are not, appropriate as a class suit brought to vin-

> dicate constitutionally guaranteed civil rights. The pleaded reason for challenging the class suit was, therefore, unfounded . . . By the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. Such a decree, of course, might name the successful plaintiff as the party not to be discriminated against. But that decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race against others. Cf. *Shelley v. Kraemer*, 1948, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161. Moreover, to require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the class discrimination proscribed by *Bush v. Orleans Parish School Board*, 5 Cir., 1962, 308 F. 2d 491, 499, on rehearing 308 F. 2d 503; see also *Ross v. Dyer*, 5 Cir., 1962, — F. 2d — [No. 19912, Dec. 28, 1962].

The Court also notes:

> Additionally, as we have recently pointed out, a school segregation suit presents more than a claim of invidious discrimination to individuals by reason of a universal policy of segregation. It involves a discrimination against a class as a class and this is assuredly appropriate for class relief.

See in accord *Sharp v. Lucky*, 252 F. 2d 910 (C. A. 5, 1958); *Johnson v. Yelding*, 165 F. Supp. 76 (N. D. Ala., 1958); *Vann, et al. v. Toledo Metropolitan Housing Authority*, 113 F. Supp. 210 (N. D. Ohio, 1953); *Coke v. City of Atlanta, Georgia*, 184 F. Supp. 579 (N. D. Ga., 1960); *Brown v. Board of Education*, 347 U. S. 483; *Orleans Parish School Board v. Bush*, 242 F. 2d 156 (C. A. 5, 1957); *Johnson v. Board of Trustees of University of Kentucky, et al.*, 83 F. Supp. 707 (E. D. Kentucky, 1949); *Wilson v. Board of Supervisors*, 92 F. Supp. 986 (E. D. Louisiana, 1950), aff'd 340 U. S. 909; *Constantine, et al. v. Southwestern*

Louisiana Institute, 120 F. Supp. 417 (W. D. Louisiana, 1954); *Tureaud* v. *Board of Supervisors of Louisiana State University*, 116 F. Supp. 248 (E. D. Louisiana, 1953), aff'd 228 F. 2d 895 (C. A. 5, 1956); *Frazier* v. *Board of Trustees of University of N. C.*, 134 F. Supp. 589 (M. D. N. Car., 1955); *Hawkins* v. *Board of Control*, 162 F. Supp. 851 (N. D. Florida, 1958); *Evers* v. *Dwyer*, 358 U. S. 202.

Only two cases were cited by the court below as purported authority for its ruling. One was the opinion of the United States District Court in the instant case upon which petitioners had brought their appeal and were seeking reversal in the court below, *Clark, et al.* v. *Thompson, et al.*, 206 F. Supp. 539 (S. D. Miss. 1962). Appendix C *infra* at page 19. The other was *Brown* v. *Board of Trustees of La Grange, Ind. School District*, 187 F. 2d 20 (C. A. 5, 1951), which held that segregated schools do not contravene the Fourteenth Amendment, that the courts cannot order a school system to be equalized, and that a Negro school child suffered no deprivation of her civil rights in attending a segregated school; this case is plainly superseded by the decision in *Brown* v. *Board of Education*, *supra*.

The decision below, by granting relief solely to the named plaintiffs in this suit, permits the state to continue its unlawful practice of racial discrimination against other Negro citizens of Mississippi. Cf. *Potts* v. *Flax*, *supra*. These other citizens, who would still be denied the use of public recreational facilities, would each be compelled to institute suit in order to gain individual exemption from state-enforced segregation. Thus, in effect, the decision would introduce an aggravated form of gradualism into the desegregation of public parks and other recreational facilities, in contravention of this Court's ruling in *Watson, et al.* v. *City of Memphis, et al.*, — U. S. —, 31 L. W. 4498 (May 27, 1963), where it was held:

> The rights here asserted are, like all such rights, present rights; they are not merely hopes to some

> future enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.

The State of Mississippi may not, either directly or indirectly, defer the rights of its Negro citizens; the decisions of this Court have made clear that the system of enforced racial segregation in public recreational facilities is unlawful. *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 386 (C. A. 4, 1955), aff'd 350 U. S. 877; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971; *Holmes* v. *City of Atlanta, supra.*

2. The refusal of the court below to declare null and void and enjoin the enforcement of statutes of the State of Mississippi which compel segregation in public recreational facilities, contravenes this Court's consistent policy and practice of striking down state regulations based on a racial criterion. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Ogama* v. *California*, 332 U. S. 633; *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *Brown* v. *Board of Education, supra*; *Browder* v. *Gayle*, 352 U. S. 903, affirming 142 F. Supp. 707 (M. D. Ala., 1956); *State Athletic Commission* v. *Dorsey*, 359 U. S. 533, affirming 168 F. Supp. 149 (E. D. Louisiana, 1958).

Petitioners seek to enjoin the enforcement of Sections 4065.3, 2056(7), and 2046.5(1) of Mississippi Code of 1942, Ann., (set out in full in Appendix D, *infra*), on the grounds that the statutes are unconstitutional and violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and Title 42, United States Code, Sections 1981 and 1983.

Section 4065.3 states that the entire executive branch of Mississippi and all persons responsible thereto are "directed and required to prohibit . . . the implementation of

or the compliance with the Integration Decisions of the United States Supreme Court . . . and to prohibit by any lawful, peaceful and constitutional means, the causing of a mixing or integration of the white and Negro races in . . . public places of amusement, recreation or assembly."

In spite of the use of the words "lawful, peaceful and constitutional means," the statute then adds immunity to the powers it purports to confer, saying that the statute itself shall be "a full and complete defense to any suit whatsoever in law or equity, or of a civil or criminal nature" which may be brought against the executive officers by any person or any state or any branch of the federal government.

Section 2056(7) makes it a conspiracy to overthrow or violate "the segregation laws of this State" through force, violence "or otherwise." The phrase "or otherwise" is unlimited and embraces peaceful challenges to segregation. This statute attempts to prevent use of public facilities on an integrated basis by acknowledging segregation laws and making disregard of them a criminal offense, and also attempts to block access to the courts to question the constitutionality of this and other segregation statutes.

Section 2046.5(1) on its face gives persons, corporations, managers and employers power to exclude members of the public from "any public business, trade or profession of any kind whatsoever in the State of Mississippi, including . . . public parks and swimming pools." This violates the Fourteenth Amendment, whether the corporations, managers and employees are municipal bodies or officials, or merely the agents of such officials. No state statute may "authorize" a constitutional violation.

These statutes do not make compliance voluntary. Section 4065.3 directs and requires; Section 2056(7) creates a punishable offense; Section 2046.5(1) purports to give public officials or their agents the power to refuse to serve the public.

Respondents claim that these statutes have not been enforced and that therefore there can be no suit to enjoin their future enforcement. A direct threat is not necessary to a finding of an actual controversy. *Eastman Kodak Co.* v. *Velveray Corp.*, 175 F. Supp. 646 (S. D. N. Y., 1959); *Paramount Pictures Corp.* v. *Holden*, 166 F. Supp. 684 (S. D. Calif., 1958); *Simmonds Aerocessories* v. *Elastic Stop Nut Corp.*, 257 F. 2d 485 (C. A. 3, 1958). These cases make clear that the Federal Declaratory Judgments Act should have a liberal interpretation, bearing in mind its remedial character and the legislative purpose of settling uncertain rights where conflicting interests are present. A clear explanation of the purposes of the Act is given by one of the draftsmen: Declaratory Judgments, by Borchard (Banks-Baldwin Law Publishing Co., Cleveland, 1941). He states at page 63 that if a statute passed pursuant to the police power is mandatory and requires little or no fact finding or administrative regulation prior to its enforcement, and if its application to plaintiff's activity is apparent, enactment suffices to create justiciability.

At page 365, Borchard refutes the argument that threat of enforcement is a prerequisite to attack on a statute:

> . . . the threat to enforce a statute, sometimes apparently believed necessary to a challenge of its validity, should play no part in a declaratory action. The requirement of a threat to enforce seems unfounded in any case, and has been disregarded in such cases as *Pierce* v. *Society of Sisters*, 268 U. S. 510, and *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365. A statute is not passed with the expectation that it will not be enforced nor is an attorney-general expected to disregard it.

Great emphasis is placed on the importance to the individual of testing the validity of a governmental restriction before it is applied, and the right to an injunction (p. 966).

> As a rule, the mere enactment of a statute or ordinance imposing restraints on an individual and im-

> plying enforcement by prosecuting officials threatens and hampers the plaintiff's freedom, peace of mind or pecuniary interests, and creates that justiciability of the issue which sustains a proceeding for an injunction and, *a fortiori*, for a declaratory judgment.

Applying this point to constitutionality, Borchard points out, at page 976:

> The experience of many jurisdictions with the declaratory judgment shows that it has been frequently employed for the purpose of obtaining a decision on the challenged power of an officer or administrative body under a statute. The issue generally involves the constitutionality or construction of a statute or ordinance. To enable this question of construction to be determined before the officer acts, is manifestly a public service to everyone concerned.

Where a party's acts come within the terms of a statute, the statute remains an imminent threat to him, and he can properly seek to have its enforcement enjoined under Title 28, United States Code, Section 2281, et seq. *NAACP* v. *Button*, 371 U. S. 415; *NAACP* v. *Patty*, 159 F. Supp. 503 (E. D. Va., 1958), vacated on other grounds *sub nom. Harrison* v. *NAACP*, 360 U. S. 167.

This is not *Poe* v. *Ullman*, 367 U. S. 497, where a statute had been on the books for years, but no action taken to enforce the state policy set forth in the statute. On the contrary, while the statutes under attack have not been enforced, Negroes have been prevented from doing what these statutes condemn—using public facilities on a non-segregated basis.

At the hearing before the District Court for the Southern District of Mississippi on March 12, 1961, uncontroverted testimony revealed that Negroes had been refused the right to use the Municipal Library—a library open for white persons only; that Negro college students who

attempted to use the facilities in March, 1961, were told to use the Negro library and on their failure to do so were arrested, and charged with breach of the peace (R. 29, 30, 63). There can be no question but that these persons were not allowed to use the Municipal Library solely because of their race and color.

It was also shown that Negroes who had attempted to sit on benches in Livingston Park were arrested (R. 98, 100); those who sought to use the swimming pool and those who sat on benches outside the swimming pool enclosure were arrested (R. 112, 114); that the Director of Public Parks had prepared a memorandum showing that public parks, golf courses and an auditorium are established exclusively for Negroes and designated as Negro facilities (R. 143-153).

There was testimony by the Chief of Police that the arrests made where Negroes attempted to assert their right to free use of public facilities took place because of fear of public disturbance (R. 201). There was no showing of any such disturbance. Negroes arrested were merely attempting to exercise peacefully their right to use public facilities. It is clear that police officers are enforcing a pattern of segregation under color of state authority, and that the respondents condone this policy.

The proof clearly entitles petitioners and the class they represent to an injunction against respondents restraining them from the continuation of racial discrimination in respect to the use of any of the public facilities which are named in the instant suit. However, such an injunction alone would not grant to petitioners full relief against deprivation of Fourteenth Amendment rights. Unless the statutes under attack are struck down, petitioners and other Negroes in the state will still be subject to the threat of their enforcement, even if the pattern of segregation re-

vealed in these proceedings is held unconstitutional. Thus, declaring the statutes invalid and enjoining their enforcement is a crucial element in this cause.

Because of the great importance of insuring civil rights and civil liberties, the federal courts have proceeded to give injunctive relief against state legislation, city ordinances, and state administrative rulings where their meaning and effect on the individual is clear. *Gilmore* v. *City of Montgomery, supra*; *Stapleton* v. *Mitchell*, 60 F. Supp. 51, 55 (D. Kan., 1945); *Bush* v. *Orleans Parish School Board*, 194 F. Supp. 182 (D. C. La., 1961); *Tomkins* v. *City of Greensboro, N. C.*, 276 F. 2d 890 (C. A. 4, 1960).

The statutes in question are on their face an explicit deprivation of rights which have long been protected by this Court. *Dawson* v. *Mayor and City Council of Baltimore, supra*; *Brown* v. *Board of Education, supra*. It is respectfully submitted that petitioners are entitled to an injunction against them.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Denial of Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit

(April 23, 1963)

Before:

HUTCHESON and GEWIN, *Circuit Judges*, and HANNAY, *District Judge*.

PER CURIAM:

It is Ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby Denied.

APPENDIX B

Judgment of the United States Court of Appeals for the Fifth Circuit

(March 6, 1963)

Before:

HUTCHESON and GEWIN, *Circuit Judges*, and HANNAY, *District Judge*.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellants, Rev. L. A. Clark, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Appendix B

Opinion of the United States Court of Appeals for the Fifth Circuit

(March 6, 1963)

Before HUTCHESON and GEWIN, *Circuit Judges*, and HANNAY, *District Judge*.

PER CURIAM: In this case the appellants complain of the judgment of the trial court refusing to grant an injunction and denying relief sought by way of declaratory judgment in an alleged class action in which it was claimed that they, and others similarly situated were denied the use of public recreational facilities in the City of Jackson, Mississippi, solely on the grounds of race and color. Upon a careful review of the record, we find ourselves in agreement with the conclusions reached by the trial court. *Brown v. Board of Trustees of La Grange Ind. Sch. Dist.*, 5 Cir., 1951, 187 F. 2d. 20; *Clark, et al. v. Thompson, et al.*, 206 F. Supp. 539.

The judgment is AFFIRMED

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By G. F. GANUCHEAU
Deputy

New Orleans, Louisiana

April 30, 1963

APPENDIX C

Opinion of the United States District Court for the Southern District of Mississippi, Jackson Division

(May 16, 1962)

Three Negro citizens and residents of Jackson, Mississippi, brought this action to enjoin the alleged enforcement of Sections 2046.5, 2056 and 4065.3 of the Mississippi Code of 1942, Recompiled. The complaint attacks the constitutionality of said statutes. The complaint further alleges that the defendant officials of the City of Jackson have denied plaintiffs the use of public facilities solely on the ground of race. Plaintiffs contend that they have been denied the right to use the public parks, libraries, zoos, golf courses, playgrounds, auditoriums and other public recreational facilities of the City. A three-judge Court was convened under Title 28 U. S. C. Section 2281. A hearing on plaintiffs' motion for a preliminary injunction was consolidated with a hearing on the merits, and defendants' motion to dissolve the three-judge District Court was taken under advisement. After mature consideration, the Court concluded that this was not a proper case for a three-judge Court. — F. Supp. —. Accordingly, an order has been entered herein dissolving the three-judge Court.

Findings of Fact

None of the plaintiffs has been arrested or threatened with arrest under any statute or alleged discriminatory practice attacked in this case. The plaintiffs have not been denied any right, privilege or immunity claimed by them by any of the defendants. Although each of the plaintiffs has been a resident of Jackson for more than 25 years, there is no evidence that they have been denied the right to use any public recreational facility in that city.

Appendix C

Jackson is a clean, progressive city of approximately 150,000 people, of whom more than 50,000 are Negroes. Jackson has been noted for its low crime rate and lack of racial friction except for the period in 1961 when the self-styled Freedom Riders made their visits. As the city rebuilt from the ashes of the Civil War, its white citizens occupied one area, and its colored citizens chose to live together in another. This custom has continued until today there are large areas of the city occupied entirely by white people and others inhabited exclusively by colored people. As this development took place, the city duplicated its parks, playgrounds, libraries and auditoriums in the white and colored areas. Under these circumstances, members of each race have customarily used the recreational facilities located in close proximity to their homes. The defendants believe that the welfare of both races will best be served if this custom is continued. They do not claim the right to require or enforce separation of the races in any public facility.

The fact that voluntary separation of the races in the use of public facilities has operated smoothly and apparently to the complete satisfaction of all concerned for many years, requires reasonable scrutiny of the evidence offered to show discriminatory action by the defendants. It is worthy of note that there was no evidence of the arrest or threatened arrest of any Negro in Jackson before the Freedom Riders aroused strained racial feelings in 1961. During that period two colored girls testified that they were arrested after they refused a police officer's order that they leave the North State Street library. Neither was a resident of Jackson. They showed no legal right to use any recreational facility in the city. Their exhibition was carefully planned for a month. They notified press and television of their intentions to break the customary

racial use of the library facility. They were met at the library by a large group of newsmen, photographers and members of both races. This Court is convinced from the evidence in this case that this was not a bona fide effort on the part of citizens to use a public facility but, on the contrary, was a deliberate attempt to create racial friction. The same is true of the arrests of a colored boy and girl in Livingston Park. These isolated publicity stunts do not represent the will or desire of the 50,000 Negro citizens of Jackson. The cases arising out of those arrests are now pending in the Courts of the State of Mississippi, and this Court should not attempt to determine the merits of those State Court actions.

The complaint alleged that the plaintiffs represented themselves and "thousands" of Negroes in Jackson and all other parts of Mississippi. It also alleged that the plaintiffs can and will adequately and fairly represent the purported class. Both the right of the plaintiff to represent anyone other than themselves and their ability to adequately and fairly represent any other persons were denied by the defendants. One plaintiff testified that he purported to represent all Negroes in Jackson. Another testified that he purported to represent all Negroes in the United States. The third plaintiff testified that she purported to represent all races of peoples in the world. All of the plaintiffs admitted that they did not discuss this action with or obtain authority to file same from any other member of the purported class. They did not know what other persons agreed or disagreed with the position they were taking in this action. Neither the identity of the purported class nor the right and ability of the plaintiffs to represent same has been established.

The defendants are not enforcing separation of the races in public recreational facilities in the City of Jackson. The defendants do encourage voluntary separation of the races.

Appendix C

Conclusions of Law

In view of the fact that the undisputed evidence shows that the plaintiffs have not been denied any right, privilege or immunity with respect to their use of public recreational facilities, there is serious doubt as to whether this case presents a justiciable controversy, but this Court is giving the plaintiffs the benefit of that doubt and finds that it has jurisdiction of the parties hereto and the subject matter hereof.

This is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled. Whether this is a proper class action involves a question of fact. *Flaherty* v. *McDonald*, D. C. Cal., 178 F. Supp. 544. The plaintiffs cannot make this a legitimate class action by merely calling it such. *Pacific Fire Ins. Co.* v. *Reiner*, D. C. La., 45 F. Supp. 703. The burden of proof on this issue was on the plaintiffs. *Oppenheimer* v. *F. J. Young & Co.*, D. C. N. Y., 3 F. R. D. 220. The plaintiffs failed to meet this burden. A class action cannot be maintained where the interests of the plaintiffs are antagonistic to and not wholly compatible with the interests of those whom they purport to represent. *Flaherty* v. *McDonald*, D. C. Cal., 178 F. Supp. 544; *Redmond, et al.* v. *Commerce Trust Co.*, C. C. A. 8th, 144 F. 2d 140; *Brotherhood of Locomotive Firemen and Enginemen* v. *Graham, et al.*, C. C. A. Dist. of Columbia, 175 F. 2d 802; *Kentucky Home Mut. Life Ins. Co.* v. *Duling*, C. C. A. 6th, 190 F. 2d 797; *Advertising Specialty National Association* v. *Federal Trade Commission*, C. C. A. 1st, 238 F. 2d 108; and *Troup* v. *McCart*, C. C. A. 5th, 238 F. 2d 289.

There has been no showing that any of the statutes attacked in this action have been enforced, and, therefore, the validity of said statutes are not involved in this controversy.

Appendix C

Voluntary segregation does not violate the Constitution of the United States which does not prohibit a municipality from permitting, authorizing or encouraging voluntary segregation. *Rice, et al,* v. *Elmore*, 165 F. 2d 387; *Reynolds, et al.* v. *Board of Public Instruction for Dade County*, 148 F. 2d 754; *Ross* v. *Middlebrooks*, 188 F. 2d 308; *Charles Rhea* v. *James E. Edwards*, 136 F. Supp. 671; *Briggs* v. *Elliott*, 132 F. Supp. 776; *Brown* v. *Board of Education*, 349 U. S. 294; *Cohen* v. *Public Housing Administration*, 257 F. 2d 73; *Holland* v. *Board of Public Instruction*, 258 F. 2d 730; *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372; *Rippy* v. *Borders*, 250 F. 2d 690; *Avery* v. *Wichita Falls*, 241 F. 2d 230; *Borders* v. *Rippy*, 247 F. 2d 268; *Browder* v. *Gayle*, 142 F. Supp. 707; *Lassiter* v. *North Hampton County Board of Elections*, 3 L. Ed. 2d 1072; *Williams* v. *Howard Johnson Restaurant*, 268 F. 2d 845; *Eaton* v. *Board of Managers of James Walker Mem. Hosp.*, 261 F. 2d 521; *Civil Rights Cases*, 27 L. Ed. 835; *Cove* v. *Parham*, 176 F. Supp. 242; *Carson* v. *Warlick*, 238 F. 2d 724; *Dawley* v. *City of Norfolk*, 159 F. Supp. 642; *Cooper* v. *Aaron*, 358 U. S. ?, 3 L. Ed. 2d 5; *Butler* v. *Thompson*, 97 F. Supp. 17; and *Williams* v. *State of Mississippi*, 42 L. Ed. 1012.

The three plaintiffs are entitled to an adjudication of their personal claims of right to unsegregated use of public recreational facilities by a declaratory judgment herein.

Under the facts of this case, the plaintiffs are not now entitled to injunctive relief. In so holding, this Court is seeking to observe a vital and fundamental policy which for many years has been pronounced and followed by the United States Supreme Court and by other Federal Courts to the effect that Federal Courts of equity shall conform to clearly defined Congressional policy by refusing to interfere with or embarrass threatened prosecution in State Courts except in those exceptional cases which call for

interposition of a Court of equity to prevent irreparable injury which is clear and imminent. Injunctive relief will never be granted where the parties seeking same have adequate remedies at law., *Douglas* v. *City of Jeanneite*, 319 U. S. 157, 87 L. Ed. 1324; *Cobb* v. *City of Malden*, C. C. A. 1st, 202 F. 2d 701; *Brown* v. *Board of Trustees*, U. S. C. A. 5th, 187 F. 2d 20; and *State of Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 83 L. Ed. 208.

A desire for a sweeping injunction cannot relieve plaintiffs of the obligation to comply with the general rule that they must present facts sufficient to show that their individual needs require injunctive relief. *Bailey* v. *Patterson*, — U. S. —, 7 L. Ed. 2d 512; *McCabe* v. *Atchison T. & S. F. Ry. Co.*, 235 U. S. 151, 59 L. Ed. 169; *Brown* v. *Board of Trustees*, U. S. C. A. 5th, 187 F. 2d 20; and *Kansas City, Mo., et al.* v. *Williams, et al.*, U. S. C. A. 8th, 205 F. 2d 47.

The Supreme Court of the United States, in the case of *Bailey, et al.* v. *Patterson, et al.*, — U. S. —, 7 L. Ed. 2d 512, held that the issuance of an injunction was an extraordinary and unusual writ. This, of course, does not announce any new law. The granting of an injunction is discretionary and dependent upon the facts of each case. It should be granted with great caution, care and deliberation on the part of the trier of the facts, and the power to issue injunctions should not be lightly indulged in, but exercised sparingly, after thoughtful deliberation and the presence of an urgent necessity. See 28 *American Jurisprudence, Injunctions*, Section 25, p. 515. Quoting briefly from that authority, it lays down the rule as follows:

> "The relief should be awarded only in clear cases, reasonably free from doubt, and when necessary to prevent great and irreparable injury."

The Court of Appeals of this Circuit in the case of *Reliable Transfer Company* v. *Blanchard*, 145 F. 2d 551, spoke as follows:

Appendix C

> **". . . It is Hornbook law that courts of equity exercise discretionary power in granting or withholding of their extra-ordinary remedies, and that although this discretionary power is not restricted to any particular remedy, it is particularly applicable to injunction, since that is the strong arm of equity, and calls for great caution and deliberation on the part of the Court."**

The individual defendants in this case are all outstanding, high class gentlemen and in my opinion will not violate the terms of the declaratory judgment issued herein. They know now what the law is and what their obligations are, and I am definitely of the opinion that they will conform to the ruling of this Court without being coerced so to do by an injunction. The City of Jackson, a municipality, of course is operated by some of these high class citizens. I am further of the opinion that during this period of turmoil the time now has arrived when the judiciary should not issue injunctions perfunctorily, but should place trust in men of high character that they will obey the mandate of the Court without an injunction hanging over their heads.

Neither the facts in the present case nor the exigencies of the situation are sufficient or urgent enough to require the granting of an injunction.

Although no injunctive relief should now be granted, this Court should retain jurisdiction over this action and each of the defendants for such further orders and relief as may subsequently be appropriate.

Order in accord herewith this 16th day of May, 1962.

S. C. Mize,
Chief Judge

Appendix C:

Declaratory Judgment

It is ordered, adjudged and declared as follows, to wit:

(1) That this is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled.

(2) That each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson.

(3) That the plaintiffs are not now entitled to any injunctive relief, but jurisdiction over this action and each of the defendants is hereby retained for the entry of such further orders and relief as may be subsequently appropriate.

(4) That all Court costs incurred herein be and the same are hereby taxed against the defendants.

Ordered, adjudged and declared, this 16th day of May, 1962.

S. C. Mize,
United States District Judge.

APPENDIX D

SECTION 2046.5(1) OF MISSISSIPPI CODE OF 1942, ANN. (1956)

Section 2046.5. Business customers, patrons, or clients—right to choose—penalty for violation.

1. Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barbershops, beauty parlors, theatres, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale, is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve; provided, however, the provisions of this section shall not apply to corporations or associations engaged in the business of selling electricity, natural gas, or water to the general public, or furnishing telephone service to the public.

SECTION 2056(7) OF MISSISSIPPI CODE OF 1942, ANN. (1954)

Section 2056. Conspiracy.

If two (2) or more persons conspire either:

(7) To overthrow or violate the segregation laws of this state through force, violence, threats, intimidation, or otherwise;

. . . such persons, and each of them, shall be guilty of a misdemeanor, and, on conviction, shall

be fined not less than twenty-five dollars ($25.00), or shall be imprisoned not less than one month or more than six (6) months, or both.

SECTION 4065.3 OF MISSISSIPPI CODE, ANN. (1956)

§ 4065.3. Compliance with the principles of segregation of the races.

1. That the entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor, the lieutenant governor, the heads of state departments, sheriffs, boards of supervisors, constables, mayors, boards of aldermen and other governing officials of municipalities by whatever name known, chiefs of police, policemen, highway patrolmen, all boards of county superintendents of education, and all other persons falling within the executive branch of said state and local government in the State of Mississippi, whether specifically named herein or not, as opposed and distinguished from members of the legislature and judicial branches of the government of said state, be and they and each of them, in their official capacity are hereby required, and they and each of them shall give full force and effect in the performance of their official and political duties, to the Resolution of Interposition, Senate Concurrent Resolution No. 125, adopted by the Legislature of the State of Mississippi on the 29th day of February, 1956, which Resolution of Interposition was adopted by virtue of and under authority of the reserved rights of the State of Mississippi, as guaranteed by the Tenth Amendment to the Constitution of the United States; and all of said members of the executive branch be and they are hereby directed to comply fully with the Constitution of the State of Mississippi, the Statutes of the State of Mis-

sissippi, and said Resolution of Interposition, and are further directed and required to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court of May 17, 1954 (347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873) and of May 31, 1955 (349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083), and to prohibit by any lawful, peaceful and constitutional means, the causing of a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government, any person employed by the federal government, any commission, board or agency of the federal government, or any subdivision of the federal government, and to prohibit, by any lawful, peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state.

2. The prohibitions and mandates of this act are directed to the aforesaid executive branch of the government of the State of Mississippi, all aforesaid subdivisions, boards, and all individuals thereof in their official capacity only. Compliance with said prohibitions and mandates of this act by all of aforesaid executive officials shall be and is a full and complete defense to any suit whatsoever in law or equity, or of a civil or criminal nature, which may hereafter be brought against the aforesaid executive officers, officials, agents or employees of the executive branch of State Government of Mississippi by any person, real or corporate, the State of Mississippi or any other state or by the federal government of the United States, any commission, agency, subdivision or employee thereof.